

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

RURAL TELEPHONE FINANCE COOPERATIVE,)	
for itself and on behalf of)	
INNOVATIVE COMMUNICATION CORPORATION)	
and the VIRGIN ISLANDS TELEPHONE)	
CORPORATION, d/b/a Innovative)	
Telephone,)	
Plaintiff,)	
)	
)	
v.)	Civil No. 2004-132
)	
JEFFREY J. PROSSER, et al.,)	
)	
Defendants.)	
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)	
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RURAL TELEPHONE FINANCE COOPERATIVE,)	
)	
Plaintiff,)	
)	
)	
v.)	Civil No. 2004-154
)	
INNOVATIVE COMMUNICATION CORPORATION,)	
)	
Defendant.)	
)	
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RURAL TELEPHONE FINANCE COOPERATIVE,)	
)	
Plaintiff,)	
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v.)	Civil No. 2004-155
)	
JEFFREY PROSSER,)	
)	
Defendant.)	
)	
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MEMORANDUM OPINION

I. Introduction

Before the Court is Plaintiff Rural Telephone Finance Cooperative's ("RTFC") Motion for Judicial Recusal. RTFC seeks recusal under 28 U.S.C. §§ 455(a) and 455(b) because Judge Gomez's spouse, Simone Francis¹, represented RTFC for approximately twenty-one days in September, 2004.² RTFC further argues that the alleged involvement of former Virgin Islands Senator Holland L. Redfield, II, in the nomination process of Judge Gomez would lead a reasonable person to question the Court's impartiality and thus requires recusal under 28 U.S.C. § 455(a).³

The parties have submitted voluminous pleadings in this matter, the majority of which has done little to provide the Court with an objective history of the material facts necessary

¹ Simone Francis, is an extremely talented and highly regarded attorney with the law firm of Ogletree, Deakins, Nash, Smoak, & Stuart, LLC ("Ogletree Deakins").

² The only objective verifiable evidence of this representation is an appearance by Attorney Francis at a utilities commission hearing.

³ Senator Redfield is not a party to this litigation, rather he is an employee and Vice President of Corporate Affairs for Defendant Innovative Communication Corporation ("ICC").

to its inquiry. Indeed, this Court has struggled mightily to recall any other case with submissions that wander between factual polar opposites with as much ease as some of those submitted by counsel. This is of particular concern to this Court where, as here, the *same party* has what appears to be diametrically opposed versions of the facts depending on the situation and relief sought. *Compare* Trans. of Status Conf. Hearing at 20 (Oct. 28, 2005) (hereinafter "Conf.") (stating that there was no need for RTFC to have local counsel *until approximately December 10, 2004*, because "there was nothing going on in the cases" in the Virgin Islands until then) *with* Mot. for Judicial Recusal at 11 (Mar. 24, 2005) (hereinafter "Mot.") (stating that Attorney Francis worked as local counsel on all three cases at bar during the three weeks Ogletree Deakins was retained in September, 2004).

While the Court normally may consider affidavits in resolving a motion for recusal, the Court should also scrutinize the factual accuracy of affidavits submitted in support of the motion. *United States v. Sciarra*, 851 F.2d 621, 625, n.12 (3d Cir. 1988). Under that level of scrutiny, RTFC's presentation of facts in its recusal motion, when juxtaposed with the positions it asserts outside of that pleading, seems designed to serve RTFC only and not to assist the Court. Accordingly, the usefulness of

the affidavit attached to RTFC's motion for recusal is diminished.⁴

Under these circumstances, the search for objective material facts, while it did not take on quite the scope of Diogenes' undertaking in ancient Greece, was not made easy. Perforce, in undertaking its analysis, the Court searched for, and placed greater reliance on, the available *objective and verifiable* material facts in the entire record. See *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000) (noting that in determining a recusal motion the court should examine the record facts). The relevant facts found by the Court are outlined below.

II. Factual Background

The series of relevant events discussed herein occurred in three different tribunals. For purposes of this discussion and for clarity, they are separated into their respective categories: the Virginia actions, the Virgin Islands Public Services Commission ("PSC") hearing, and the Virgin Islands derivative action.

⁴ While the Court presumes that counsel acted as officers of this Court and had no intention to mislead the Court situationally, the discordant positions give this Court considerable pause in relying on the movant's affidavit.

A. The Virginia Actions

Between 1987 and 2003, Innovative Communication Corporation ("ICC") borrowed over \$500 million from RTFC, securing the loans with a pledge of Vitelco⁵ stock and the personal guarantee of Jeffrey J. Prosser ("Prosser"), ICC's Chief Executive (referenced to herein as the "loan agreement"). (Mot. at 4.) On June 1, 2004, RTFC filed a complaint (the "default action") against ICC in the United States District Court for the Eastern District of Virginia alleging that ICC had defaulted under its loan agreement.⁶ (RTFC's Complaint docketed as E.D. Va. Civil Action No. 1:04CV633, at 1-3.) In that Virginia matter, RTFC was represented by the law firm of Thelen, Reid, & Priest LLP ("Thelen Reid"). Specifically, the following attorneys from Thelen Reid appeared on behalf of RTFC: Mark F. Evans, Gerald Zingone, Jonathan D. Siegfried, Lawrence S. Hirsh, Alyson L. Redman, and Alison L. Schrader. (RTFC's Resp. to Questions Presented in the Court's Oct. 26, 2005, Order (Oct. 27, 2005) (hereinafter "RTFC's Resp. to Questions").)

⁵ Vitelco is ICC's telephone subsidiary serving the Virgin Islands.

⁶ RTFC provides low-interest loans to rural telecommunications companies and their affiliates.

On September 20, 2004, RTFC filed a complaint against Prosser in the Eastern District of Virginia (the "guarantee action")⁷ alleging that Prosser personally guaranteed the indebtedness of ICC to RTFC and that such indebtedness was due and owing. (RTFC's Complaint docketed as E.D. Va. Civil Action No. 1:04CV1106, at 1-2.) The only attorney who appeared for RTFC in the guarantee action was Gerald Zingone of Thelen Reid. (RTFC's Resp. to Questions.) On October 8, 2004, ICC filed a motion to transfer the two Virginia cases to the District of the Virgin Islands. (ICC's Mot. to Transfer (Oct. 8, 2004); Dockets of E.D. Va. Civil Action Nos. 1:04CV633 and 1:04CV1106.) On October 19, 2004, Chief Judge Hilton of the Eastern District of Virginia, issued an order granting the motion to transfer. RTFC filed a motion for reconsideration of that order on October 29, 2004, which Chief Judge Hilton denied on November 5, 2004. (Dockets of E.D. Va. Civil Action Nos. 1:04CV633 and 1:04CV1106.) The cases were transferred to the District of the Virgin Islands shortly thereafter.

Both the guarantee action and the default action were docketed in the District of the Virgin Islands on November 9, 2004. (Dockets of D.V.I. Civil Nos. 2005-154 and 2005-155.)

⁷ Collectively, the default and guarantee actions are referred to as the "Virginia actions" or the "Virginia litigation."

Nothing was filed in those cases in the District of the Virgin Islands until December 10, 2004, when RTFC filed motions to transfer the cases back to Virginia. (*Id.*) RTFC's motions argued that there were no judges in the District of the Virgin Islands who could hear the cases. (RTFC's Mem. in Supp. of Plaintiff's Mot. to Transfer, at 1-2, 9 (Oct. 8, 2004) (claiming that both Judge Gomez and Chief Judge Raymond Finch would need to recuse).)⁸ On December 9, 2004, the day before the motions were filed, RTFC retained J. Daryl Dodson of Moore, Dodson & Russell, P.C., to represent it in the Virgin Islands in the two transferred cases. (RTFC's Resp. to Questions.)

At an October 28, 2005, status conference, RTFC revealed that between October 19, 2004, and December 9, 2004, RTFC did not have local Virgin Islands counsel in the two cases:

The Court: So are you saying there was no one that represented the RTFC interest . . . locally in the guaranty action and the default action between the transfer date, let's say October 19th and December 9th, 2004?

. . . .

Mr. Siegfried: Yes, I think that's correct Your Honor.
There would not have been a local counsel

⁸ Even if that were so, this would be no reason to transfer the cases out of the district. Instead, "the chief judge of the Third Judicial Circuit of the United States [would] assign a judge . . ." to hear the cases in the District of the Virgin Islands. 48 U.S.C. § 1614.

because there was nothing going on in the cases.

. . . .

Mr. Holt: . . . I think nothing really happened in this case until early December

(Conf. at 20, 22 (emphasis added).)

Ogletree Deakins has neither entered an appearance in the default action nor in the guarantee action either in Virginia or in the Virgin Islands. Additionally, Ogletree Deakins has no financial interest in the default or guarantee actions. (RTFC's Resp. to Questions.)

B. The September 10, 2004,
Public Services Commission Hearing

RTFC retained Dudley, Topper, and Feuerzeig LLP ("Dudley Topper") on or about June 1, 2004.⁹ (Conf. at 16). Dudley Topper was retained to "(i) provide general advice with respect to the corporate law of the Virgin Islands, (ii) to check the public records of the Virgin Islands . . . [regarding RTFC's liens], (iii) to provide general advice with respect to the scope of the PSC's authority over Vitelco as a regulated utility, and . . . (iv) to arrange for meetings between representatives of the

⁹ During the October 28, 2005, status conference, RTFC stated that it retained Dudley Topper the day before the complaint in the default action was served. The summons were issued to ICC on June 2, 2004.

PSC and RTFC." (Resp. to Motion for Recusal, Ex. C, Dudley Topper Affidavit, at 3 (Aug. 22, 2004).)

Because of a conflict of interest, RTFC "parted with the Dudley Topper firm . . . at the end of June of 2004." (Conf. at 16.) Dudley Topper, by its own admission, had no involvement with the Virginia actions. (Resp. to Motion for Recusal, Ex. C, Dudley Topper Affidavit, at 4.) Due to Dudley Topper's inability to continue its representation of RTFC, RTFC hired Ogletree Deakins as replacement counsel on September 7, 2004. (RTFC's Resp. to Questions.)

Attorney Francis, along with Eric Cowan, Richard Rubin, Jonathan Siegfried, Joseph Tiano, John List, and Steven Lilly¹⁰, appeared on behalf of RTFC at a PSC hearing on September 10, 2004. The PSC was concerned with the financial viability of Vitelco because Vitelco's stock was pledged to RTFC as security for its loans to ICC. (PSC Hearing Transcript at 22 (Sept. 10, 2004)(hereinafter "Trans."); Mot. at 11.)

RTFC presented a basic background of the default action in Virginia. (Trans. at 28-31.) The PSC was reminded that it was the Eastern District of Virginia -- not the PSC -- that had the authority to reach a conclusion about who was right in the default action:

¹⁰ Mr. Lilly is a Senior Vice President at RTFC.

Mr. Cowan: . . . You don't have to reach a conclusion about who is right or wrong in the Virginia litigation. . . .

. . . .

Mr. Siegfried: . . . We're not asking you to decide the complaint. *That's up for a judge in Virginia.* . . .

(*Id.* at 34, 42 (emphasis added); see also *id.* at 48, 58.) The PSC Chair emphasized that the PSC is "very neutral to both sides" and would be there to regulate the provider of the phone service, whoever that might be, pursuant to the Virginia court's decision. (*Id.* at 107.)

Throughout the PSC hearing, it was apparent that both RTFC and ICC believed that any dispute between those two entities was not before the PSC, but rather would be resolved *in Virginia* within a few months.

Mr. Cowan: . . . I anticipate we'll be litigating this case in the Eastern District of Virginia in December [2004] or January [2005]

. . . .

Mr. Davis: Now, Mr. Lilly is not the judge who will decide whether an event of default has occurred. A Federal District Court Judge named Judge Hilton in Virginia is suppose to decide that. . . .

(Trans. at 37, 63; see also *id.* at 32, 48, 51, 61-63, 68.) At the time, no cases related to RTFC and ICC were pending in the Virgin Islands.

RTFC brought several representatives to the hearing. Attorney Francis was not introduced by RTFC (*id.* at 26-27), and she spoke only to state her name at the beginning of the hearing and to identify herself as local counsel for RTFC. (*Id.* at 5.) Her role as an inactive attendant was Attorney Francis's only objectively clear involvement in the PSC matter. RTFC's presentation to the PSC was made entirely by its attorneys from Thelen Reid - Mr. Cowan and Mr. Siegfried - with Mr. Lilly briefly answering some questions near the end.

On or about September 28, 2004, RTFC and Ogletree Deakins parted ways.¹¹ On September 30, 2004, another PSC hearing was held. This time no representatives from Ogletree Deakins attended. Instead, attorney Bruce Bennett from Hunter, Cole, & Bennett ("Hunter") appeared for RTFC. (Conf. at 25-26; RTFC's Notice of Correction (Oct. 28, 2005).)

C. The Virgin Islands Derivative Action

On September 30, 2004, RTFC filed a derivative shareholder suit (the "derivative action") against ICC in the District of the

¹¹ At the October 28, 2005, hearing, RTFC counsel indicated they parted ways on September 28, 2004. However, they also indicated it was the day before the derivative action was filed. (Conf. at 17.) While the derivative action was filed on September 30, 2004, replacement counsel was retained on September 29, 2004. (RTFC's Resp. to Questions.)

Virgin Islands, docketed as Civil Number 2004-132. RTFC contends that it retained Ogletree Deakins to assist in drafting the derivative action complaint. (Mot. at 12; Mot. Ex. C, Siegfried Decl.) Allegedly, Ogletree Deakins provided comments on the draft complaint, researched legal issues and discussed the underlying claims with RTFC counsel. (Mot. at 12; Mot. Ex. C, Siegfried Decl.)

However, Richard Hunter was the local counsel that filed the derivative action. Ogletree Deakins and RTFC had ended their relationship before commencement of the derivative action. Thus, Ogletree Deakins has not entered an appearance in the derivative action, nor does Ogletree Deakins have a financial interest in the outcome of the derivative action. (RTFC's Resp. to Questions.)

III. Analysis

RTFC seeks the Court's recusal from the default action, the guarantee action, and the derivative action, pursuant to 28 U.S.C. §§ 455(a) and 455(b)(5)(ii). Under 28 U.S.C. § 455(a), a judge must disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." Recusal is mandatory under section 455(b)(5)(ii) when the judge or his spouse "is acting as a lawyer in the proceeding." Yet, "[t]here

is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987) (citations omitted). Indeed, while "[l]itigants are entitled to an unbiased judge[, they are] not [entitled] to a judge of their choosing." *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988).

A. Recusal Under Section 455(b)(5)(ii)

1. The Default and Guarantee Actions

RTFC argues that Attorney Francis's appearance at the September 10, 2004, PSC hearing requires Judge Gomez's recusal under section 455(b)(5)(ii). However, the statute requiring recusal when the judge or his spouse "is acting as a lawyer in the proceeding" defines "proceeding" as including "pretrial, trial, appellate review, or other stages of the litigation." 28 U.S.C. § 455(d)(1). As the Third Circuit has mentioned, each of the examples in the statute "implies the judge's participation in decisions affecting the substantive rights of litigants to an actual case or controversy." *Sciarra*, 851 F.2d at 635. Under this standard, RTFC's claim for relief in the default and guarantee actions under section 455(b)(5)(ii) must fail for several reasons.

First, the September 10, 2004, PSC hearing was not a proceeding as defined in section 455(d)(1). The PSC's authority is only over public utility companies and thus the PSC would have no authority over any of the matters in the Virginia litigation. See V.I. Code Ann. tit. 30, § 1. Moreover, no portion of the PSC hearing was meant to adjudicate the substantive rights of any party. Indeed, the PSC hearing was not an adversarial hearing, as the only party over which the PSC has any authority is the utility that it could regulate.

Although the examples in section 455(d)(1) do not appear to be exclusive, the list does seem to only include stages of litigation. The September 10, 2004, PSC hearing was not a part of the Virginia litigation, nor could it be. In fact, any regulatory issue addressed at the PSC hearing remains separate and distinct from the default and guarantee proceedings before this Court. The proceeding to which section 455(d) refers is the one before this Court (either the default or guarantee action). See, e.g., *Diversifoods, Inc., v. Diversifoods, Inc.*, 595 F. Supp. 133 (N.D. Ill. 1984) (noting that the judge did not need to recuse when her attorney husband had "done nothing in connection with *this* litigation [and] [t]he defendant ha[d] been represented by other counsel during all phases of *this* proceeding") (emphasis added)).

If the PSC hearing could be referred to as a "proceeding," it would only be in the most generic sense, suggesting an "event," as opposed to a proceeding contemplated by section 455(d) or the case law that interprets that section. As the participants in the PSC hearing observed repeatedly, the PSC was neither the fact finder nor the determiner of law:

Mr. Siegfried: . . . We're not asking you to decide the complaint. That's up for a judge in Virginia. . . .

. . . .

Mr. Davis: This is not a courtroom and you are fortunate that you are not the judges of the litigation.

The Chair: *Thank God.*

(Trans. at 42, 58 (emphasis added).) Accordingly, the Court finds that the PSC hearing, viewed from any perspective, is separate and distinct from the default and guarantee proceedings then pending in Virginia.

Second, contrary to RTFC's claim, this Court does not find that Ogletree Deakins played any role in the Virginia actions while they were pending in Virginia. Ogletree Deakins's involvement with RTFC lasted approximately three weeks and was solely as uninvolved local counsel at the September 10, 2004, PSC hearing. Because neither the default nor guarantee actions were pending in the Virgin Islands during that time period, and RTFC

clearly expected the Virginia actions to be resolved in Virginia, there was no reason to retain local Virgin Islands counsel in those proceedings.

Indeed, during the time RTFC had any relationship with Ogletree Deakins, the Virginia litigation was clearly expected to be resolved in Virginia. As RTFC stated on October 28, 2005, there was no need for local Virgin Islands counsel in the default or guarantee actions until approximately December 10, 2004, more than two months after RTFC parted ways with Ogletree Deakins. Before the transfer, the Virginia default and guarantee actions were entirely Virginia matters with Virginia counsel, before a Virginia court, with no need for Virgin Islands counsel. Only subsequent to the transfer did RTFC's need for Virgin Islands counsel in the Virginia actions ripen, at which point RTFC's only Virgin Islands counsel in those actions was Daryl Dodson.

Because RTFC and Ogletree Deakins parted ways long before the cases were transferred to the District of the Virgin Islands, Ogletree Deakins clearly did not play any role in the cases in the Virgin Islands. Thus, recusal in the default and guarantee actions is not required under section 455(b)(5)(ii).

2. The Derivative Action

To the extent that RTFC argues that recusal is necessary in the derivative action under section 455(b)(5)(ii), that argument must similarly be rejected as it lacks support in the law.

The Third Circuit has construed section 455's use of "proceeding" as "embrac[ing] only such activity following the initiation of an action by a private party or governmental agency designed ultimately to modify or affect the substantive rights of a litigant." *Sciarra*, 851 F.2d at 635. It is axiomatic that an action commences with the filing of a complaint. Fed. R. Civ. P. 3; see also *Sciarra*, 851 F.2d at 635. Because the complaint in the derivative action was not filed until September 30, 2004, and Ogletree Deakins parted ways with RTFC before such commencement, Attorney Francis could not possibly have acted as a lawyer in the derivative proceeding. Accordingly, recusal in the derivative action is not required under section 455(b)(5)(ii).

B. Recusal Under Section 455(a)

Section 455(a) requires recusal when "a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality." *United States v. Dalfonso*, 707 F.2d 757, 760 (3d. Cir. 1983); see also *Sciarra*, 851 F.2d at 625. A high threshold is required to satisfy the standard of section 455(a).

Liteky v. United States, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring). Recusal is required if the "judge's impartiality might reasonably be questioned by a 'well-informed, thoughtful observer rather than [by] a hypersensitive or unduly suspicious person.'" *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001). The Court "cannot adopt a *per se* rule holding that when someone claims to see smoke, we must find that there is fire." *Bayless*, 201 F.3d at 129. If that were the case, "[j]udge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal." *In re Drexel Burnham Lambert, Inc.*, 861 F.2d at 1309.

RTFC's motion for recusal, when viewed against the backdrop of the objective facts, including its own admissions outside of its recusal pleading, raises some of the concerns against which the *Bayless* and *Drexel* courts cautioned. RTFC has argued for relief for what, at one moment, seems to be immutable factual bases. See, e.g., Conf. at 20 (acknowledging that when the default and guarantee actions were pending in Virginia there was no need for RTFC to have local Virgin Islands counsel as "there was nothing going on in the cases" in the Virgin Islands prior to about December 10, 2004). Yet, those bases shift like tectonic plates along the San Andreas fault depending on the relief sought. See, e.g., Mot. at 11 (claiming Attorney Francis worked

as local counsel on all three cases during the three weeks Ogletree Deakins was retained in September, 2004).

1. The Default and Guarantee Actions

As outlined above, this Court finds that Ogletree Deakins had a relationship with RTFC for approximately twenty-one days in September, 2004. During that time Ogletree Deakins and Attorney Francis served as replacement counsel for Dudley Topper by attending to a PSC matter that Dudley Topper was previously charged with handling. At no time did Ogletree Deakins participate in any Virginia actions. During the twenty-one day period in September, 2004, there was no default or guarantee action in the Virgin Islands, nor was there any intention to pursue such an action in the Virgin Islands. Given these circumstances, a well-informed reasonable person could not question this Court's impartiality in presiding over the default and guarantee actions.

This Court reaches that conclusion precisely because where, as here, a party merely mentions the possibility of the existence of the "smoke" of impartiality in the recusal context, it has not been a legally sufficient basis for a court to conclude there is "fire" and recuse, absent objective and reliable facts from which a well-informed, thoughtful observer might reasonably question

the Court's impartiality. *See, e.g., Drexel*, 861 F.2d at 1309, 1312-13.¹² There are no such objective material facts that support the movant. Accordingly, the Court is convinced that a well-informed thoughtful observer would not reasonably question the Court's impartiality in the default and guarantee actions because of the September 10, 2004, PSC hearing.

RTFC also seeks recusal under section 455(a) in the default and guarantee actions due to the alleged involvement of Senator Redfield in Judge Gomez's nomination process. This argument is fundamentally flawed in several respects and requires little discussion.

RTFC argues that Senator Redfield "reportedly played a central role in the nomination and confirmation to the bench" of Judge Gomez. (Mot. at 2.) Of particular concern, RTFC notes that at Judge Gomez's investiture, the Court stated that:

Holland Redfield learned about me, made some inquiries, did some more due diligence and recommended me to the White House. He has been gracious and helpful throughout this entire process, and I am delighted that he is here.

¹² Were that the case, RTFC could engage in the very "judge shopping" against which *Drexel* cautions. While the Court notes this possibility, the Court in no way presumes or suggests that RTFC's motion for reconsideration of the order to transfer, motion to transfer the case back to Virginia, and motion for recusal, were efforts to do anything improper or to "judge shop." This Court recognizes that counsel for any party has a right and, indeed, an obligation to seek relief from any order or act that any court has undertaken or may undertake that a party, based in fact and law, believes is incorrect.

(Mot. at 15 (quoting Trans. of Investiture Ceremony on Jan. 28, 2005, at 52-53).) While the former senator is not a party to the proceedings, RTFC contends he is involved in aspects of the defendants' business dealings and thus may be a potential witness. (Mot. at 14.)

However, an expression of gratitude could not be a legal basis for which recusal was necessary. At the investiture, this Court also thanked many others in attendance who are affiliated with entities that appear regularly before this Court: the Governor of the Virgin Islands, Charles Turnbull; Virgin Islands Congressional Delegate Donna Christensen; the U.S. Attorney; members of the Court's staff; the defense bar; and the Third Circuit. (Trans. of Investiture Ceremony on Jan. 28, 2005, at 53-55, 60-61.) The Court expressed appreciation for the entire Virgin Islands bar; the community; and three of his high school teachers, among many others. (*Id.* at 56, 58, 62.) If merely thanking someone in the relatively small Virgin Islands community who might have any kind of affiliation with some future litigant was a valid basis for recusal, this Court could not function as recusal would be required in just about every matter that comes before the Court. *Cf. Cheney v. United States*, 541 U.S. 913, 916 (2004) ("A rule that required Members of this Court to remove themselves from cases in which the official actions of friends

were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials").

Senator Redfield was among a number of people for whom this Court expressed gratitude at the investiture ceremony. This Court is not convinced that any reasonable person knowing all of the facts would question the impartiality of Judge Gomez in the default and guarantee actions because of such expression.

2. The Derivative Action

To the extent RTFC seeks recusal in the derivative action because of Senator Redfield, the Court reaches the same conclusion as in the default and guarantee actions discussed above -- recusal is not required under section 455(a) because of any gratitude expressed towards Senator Redfield at the investiture ceremony. Yet, the Court feels compelled to view the Virgin Islands derivative action differently from the default and guarantee actions.

The difference between the PSC hearing and the Virginia litigation, as described above in Section III.A.1, is much like the distinction between the Virginia litigation and the derivative action. RTFC itself has argued before this Court that between the default action and the derivative action, "the issues of law and fact to be decided in each case are quite different.

The cases involve different parties, different claims, different law, different damages, different witnesses, and different triers of fact." (RTFC's Mem. of Law in Opposition to ICC's Mot. to Consolidate, Feb. 7, 2005, at 3.) RTFC also stated that "[t]here are no common defendants against whom damages are sought in the two actions. *Nor are there common counsel*" between the cases.¹³ (RTFC's Mem. of Law in Opposition to ICC's Mot. to Consolidate at 4 (emphasis added).) As RTFC has explained, the derivative action "involves an entirely different set of legal and factual inquiries" than the default action. (RTFC's Mem. of Law in Opposition to ICC's Mot. to Consolidate at 8.)

The Court agrees that the derivative action -- the only Virgin Islands-initiated action before this Court -- is a different species in kind, legally and factually, from the Virginia-initiated default and guarantee actions. Though the Court has found no objective and verifiable facts that a reasonable person would question the Court's impartiality in the derivative action such that recusal would be required, with an over-abundance of caution, the Court will recuse in that separate and distinct matter.

¹³ While it is somewhat unclear to which party RTFC refers as not having common counsel between the cases, RTFC seems to suggest that the lack of common counsel is further indication that the default and derivative cases are distinct.

IV. Conclusion

For the twenty-one day period in September, 2004, when Ogletree Deakins had a relationship with RTFC, the default and guarantee actions were neither in this Court nor intended to be addressed by this Court, such that local counsel would ever be required. Because Attorney Francis did not act as a lawyer for RTFC in the default or guarantee proceedings before this Court, this Court need not recuse under section 455(b)(5)(ii). Additionally, this Court finds that a reasonable person knowing all of the facts in this matter would not question the Court's impartiality in presiding over those matters. Accordingly, RTFC's motions for judicial recusal in the default and guarantee actions will be denied.

As discussed above, the Court is not convinced that objective and verifiable facts warrant recusal in the derivative action pursuant to section 455(a). Even so, the Court regards the Virgin Islands action differently from the default and guarantee actions and will recuse in that matter. An appropriate order follows.

Dated: November 16, 2005

/s/
CURTIS V. GÓMEZ
District Judge

ATTEST:

WILFREDO F. MORALES
Clerk of the Court

By: /s/
Deputy Clerk

Copy: Hon. Geoffrey W. Barnard
Joel Holt, Esq.
Richard Hunter, Esq.
Daryl Dodson, Esq.
LaToya Corprew, Third Circuit Case Manager
Carol C. Jackson
Lydia Trotman
Olga Schneider
Kendra Nielsam

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

RURAL TELEPHONE FINANCE COOPERATIVE,)	
)	
Plaintiff,)	
)	
)	
v.)	Civil No. 2004-154
)	
INNOVATIVE COMMUNICATION CORPORATION,)	
)	
Defendant.)	
_____)	

ORDER

Before the Court is plaintiff Rural Telephone Finance Cooperative's motion for judicial recusal in the above-captioned matter (the "default action"). For the reasons stated in the accompanying memorandum of even date, it is hereby

ORDERED that the motion for judicial recusal in the default action is **DENIED**.

Dated: November 16, 2005

_____/s/_____

CURTIS V. GÓMEZ
District Judge

ATTEST:

WILFREDO F. MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

Copy:	Hon. Geoffrey W. Barnard	Lydia Trotman
	Daryl Dodson, Esq.	Carol C. Jackson
	Joel Holt, Esq.	
	LaToya Corprew, Third Circuit Case Manager	
	Olga Schneider	
	Kendra Nielsam	